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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 375

LESTER E. STONE,
117 West Grimsby Road,
Kenmore, New York,

Petitioner,

vs.

MADELEINE L. STONE,
314 North Detroit Avenue,
Los Angeles 36, California,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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ERRATA

In printing the Petition for Certiorari, the following paragraphs were omitted at the places indicated:

Following the second paragraph on page 10:

> Similarly, the Court of Appeals treated this case as having arisen out of the separation agreement rather than out of the Nevada decree. The official report of the case before the Court of Appeals describes the case as an action "for specific performance of certain provisions of a separation agreement" (Appendix B, *infra*).

Following the first four lines on page 19:

> The only instances where the normal provisions of the Internal Revenue Code were not to apply, were specifically designated in the decree. Thus, exceptions were made so as to exclude non-personal service income, and so as to disallow only excessive charitable contribution deductions (R. 235-236).

September 5, 1956

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York made in the above case on May 24, 1956.

Citations to Opinions Below

The memorandum opinion of the Supreme Court of the State of New York is unreported and is printed at pages 8-14 of the Record.* The memorandum of the Appellate Division of the Supreme Court is reported at 1 App. Div. 2d 756, 147 N. Y. Supp. 2d 209, and is printed, together with

* References to the record made in this petition refer to page numbers of the record, not to folio numbers as previously inserted for the use of Court of Appeals of the State of New York.

that Court's order, at pages 269-272 of the Record. The decision, without opinion, of the Court of Appeals of the State of New York is reported at 1 N. Y. 2d 785, 13 N. E. 2d 590, and is printed in Appendix B, *infra*. The remittitur of that Court is printed at pages 1a-3a of the Record. The order of the Court of Appeals of the State of New York denying the petitioner's motion for reargument of his appeal is not as yet reported, and is printed at page 362 of the Record.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was made and remitted to the Supreme Court of the State of New York on May 24, 1956 (R. 1a-3a). The judgment of the Court of Appeals of the State of New York was entered as the judgment of the Supreme Court of the State of New York on July 18, 1956 (stipulation of omission at R. 359-361). A timely motion for reargument, made in the Court of Appeals of the State of New York on July 9, 1956 (R. 369), was denied by that Court on July 11, 1956 (R. 362). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3) [since the full faith and credit to be accorded to the judicial acts of a sister state is drawn in question].

Questions Presented

1. Whether it is denial of full faith and credit for the courts of a state to render a judgment based solely upon an agreement which has been superseded by the decree of a sister state.

2. Whether it is a denial of full faith and credit for the courts of a state to modify the judgment of a sister state when that judgment is not subject to modification in the state where rendered.

3. Whether it is a denial of full faith and credit for the courts of a state to interpret the judgment of a sister state in a manner contrary to the law of the state where rendered.

4. Whether it is a denial of full faith and credit for the courts of a state to do by indirection that which they could not do directly to the decree of a sister state.

5. Whether it is a denial of full faith and credit for the courts of a state to ignore the incorporation by reference in the decree of a sister state of the definitional provisions of a federal statute.

Constitutional and Statutory Provisions Involved

The Constitutional provision involved in this case is U. S. Const. Art. IV, sec. 1. The statutory provision involved is 62 Stat. 947, 28 U. S. C. sec. 1738. They are printed in Appendix A, *infra*.

Statement of Case

This petition involves a Nevada decree of divorce rendered between the parties on March 20, 1953 (R. 233-241). That divorce action was commenced by respondent, and plaintiff entered a general appearance at the proceedings (R. 233). In addition to dissolving the marriage, the Nevada Court decreed the maintenance and support, rights and obligations of the parties (R. 236-237).

By its terms, the Nevada decree incorporated a prior separation agreement dated January 2, 1953 (R. 8; 19;

234-235). That separation agreement was embodied in, and superseded by, the Nevada decree (R. 8; 19; 59-60; 74; 211).

On August 31, 1954, this action was commenced by the respondent for enforcement of the maintenance and support obligations imposed upon the petitioner by the Nevada decree (R. 32-33; 47; 236-237).

Against the argument of petitioner's counsel, the Trial Court rejected the Nevada decree and made its findings and conclusions based solely upon the separation agreement (R. 8; 14; 17; 20-21). Petitioner raised the federal question of full faith and credit to, and the superseding effect of, the Nevada decree, but this argument was rejected by the Trial Court's decision (R. 14; 59-60; 71-74; 178-188). The Trial Court's decision was affirmed by the Appellate Division of the Supreme Court, and by the Court of Appeals (R. 269-272; 1a-3a).

In addition to holding that the separation agreement had been embodied in the decree (R. 8; 19; 74), the Trial Court stated and held that New York Courts were without the power to change or modify the Nevada decree (R. 14; 74). The New York Court had before it the question of enforcing the decree (R. 32-33; 47) but disregarded that instrument's legal effect (R. 8; 14). Rather, the New York Courts assumed jurisdiction over the pre-decree separation agreement and acted thereon, ruling in effect that the existence of a decree was irrelevant (R. 8; 14; 17; 19; 73). No findings were made as to the legal effect of the Nevada decree (R. 14-27).

Petitioner contended that such action by the Courts would give effect to an instrument which had been super-

seded by a foreign decree, which decree was entitled to full faith and credit (R. 71-74).

The Court ruled against the admission of petitioner's evidence explaining the terms of the Nevada decree (R. 149; 155; 187-188). In its decision the Court held that it was bound to examine all the facts and circumstances surrounding the preparation, execution and performance of the superseded separation agreement (R. 14; 17), but made no interpretation of the decree (R. 14).

The petitioner's support obligation was established in the separation agreement (Nevada decree provision at R. 236) as one-third of his "net income for federal income tax purposes (certified copies of returns and changes therein to be furnished to the plaintiff) from personal services . . ." (R. 202).

The New York Courts interpreted this provision of the separation agreement as denying to the petitioner the use of the personal deductions specified in the Internal Revenue Code for the computation of "net income" (R. 20-21). Under the New York interpretation, the petitioner is allowed only those deductions which are both provided for in the Code, and also "directly attributable" to the production of petitioner's income from personal services (R. 20-21).

The phrase "directly attributable" appears neither specifically nor by implication in the decree (or in the separation agreement) (R. 187-188; 199-212; 233-240).

Based upon these findings, the Trial Court rejected the petitioner's subtraction of the Code-provided personal deductions from his adjusted gross income. Taking one-third of the additional amount thus added to the petitioner's

"formula income", the Trial Court rendered a judgment for respondent in the sum of $3,367.59 (R. 7).

On appeal, the Appellate Division of the Supreme Court, on October 25, 1955, modified and affirmed the Trial Court's judgment (R. 269-270). The modification was made so as to allow to the petitioner a previously disallowed charitable contribution which, the formula provided, could only be disallowed on certain (non-applicable) circumstances (R. 271-272).

On May 24, 1956, the Court of Appeals of the State of New York affirmed, without opinion, the judgment of the Appellate Division (R. 1a-3a; Appendix B, *infra*), and on July 11, 1956, that Court denied the petitioner's motion for reargument of his appeal (R. 362).

The Federal Question

The federal question before the New York Courts here was a "threshold" question, and was, *per force*, raised in, and decided by, every Court which has previously considered this case. It has long been held that where the final judgment of a State Court necessarily involves an adjudication of a claim made therein that a federal right has been abridged, this Court has jurisdiction of the question even where the State Court does not expressly pass upon that question. *Chicago Life Insurance Company v. Needles*, 113 U. S. 574, 579; *Missouri K & T Ry. Co. v. Haber*, 169 U. S. 613, 621-622; *Manhattan Life Insurance Company v. Cohen*, 234 U. S. 123, 134. In the official report of this case before the Court of Appeals of New York, it is expressly stated that the petitioner's right to have the Nevada decree given full faith and credit, was urged on the Court (Appendix B, *infra*).

The Courts below unavoidably ruled upon the effect of the Nevada decree upon the parties and upon the separation agreement (R. 71-74). This was a question *in limine*. When the New York Courts rendered judgments against the petitioner based upon the separation agreement (R. 8; 14), those Courts had necessarily concluded that the doctrine of full faith and credit did not preclude the relief given. This was a rejection of the petitioner's claim that the Nevada decree was a bar to the action on the agreement (R. 14; 72; Appendix B).

Here, there were no non-federal grounds of decision upon which the lower Courts could have based their judgments. *A fortiori*, there was no non-federal ground broad enough to sustain those judgments. The federal question of full faith and credit was necessarily decided by those Courts. *Chicago Life Insurance Company v. Needles*, 113 U. S. 574, 579; *Missouri K & T Ry. Co. v. Haber*, 169 U. S. 613, 621-622; *Manhattan Life Insurance Company v. Cohen*, 234 U. S. 123, 134.

This Court has repeatedly stated that there are numerous ways in which a federal question may be asserted before State Courts, and thus preserved for this Court.

"No particular form of words or phrases is essential but only that the claim and the ground therefor be brought to the attention of the State Court with fair precision and in due time. If the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Bryant v. Zimmerman*, 278 U. S. 63, 67. Accordingly, the burden of proving that the record is not consistent with the raising of the federal question before the State Courts is upon the respondent in a petition for certiorari.

The memorandum opinion of the Trial Court acknowledges that the petitioner contended before that Court that the Nevada decree was a bar to the action on the old separation agreement (R. 14). The record also reveals that fact (R. 59-60; 71-74). The petitioner put into evidence the Nevada decree, and asserted the limiting effects of the full faith and credit doctrine on the New York Courts (R. 59-60; 71-74; 148).

During the trial, the Court ruled that it had no power to modify the decree and thereby precluded petitioner from objecting further on that point (R. 74). Subsequently, in its findings and judgment, the Court modified and denied full faith and credit to the decree and rejected consideration thereof (R. 14; 20-21; 67). In addition, the Court sustained objections made by the respondent to the introduction, by petitioner, of evidence which was necessary in order to give effect to the full faith and credit doctrine (R. 149; 155). In New York, an exception is automatically taken by the party against whom a trial ruling is made when that party's position is made clear to the Court. *New York Civil Practice Act*, Sec. 445. That section applies here.

On appeal to the Appellate Division of the Supreme Court, and to the Court of Appeals of New York, the petitioner raised the question of full faith and credit and asserted that it had been denied to the Nevada decree in this case. The synopsis of petitioner's contentions in the Court of Appeals, accompanying that Court's decision, expressly states that the question of the effect of the Nevada decree was raised before that Court. Appendix B, *infra*.

Had there been, as there was not, any deficiency in the way the federal question was framed at the trial, that

deficiency would have been cured by the raising of the federal question before the Appellate Courts, and by the deciding of that question by those Courts. *Charleston Federal Savings & Loan Association v. Alderson*, 324 U. S. 182; 185-186; *Cf. Whitney v. California*, 274 U. S. 357, 360-361.

The petitioner's brief to the Court of Appeals in support of his motion for reargument is included at pages 365-392 of the Record. There, the petitioner urged that despite his previous written and oral arguments on the point (see Appendix B), the Court had overlooked the fact that the effect of its decision was to deny full faith and credit to the Nevada decree (R. 375-382).

Because of the specific raising of these arguments at the trial and on appeal, and because of the "threshold" nature of the federal question, the jurisdiction of this Court was preserved.

However, should this Court desire to do so, there are numerous precedents which permit the Court to grant the writ of certiorari at this time, and at the same time to grant a continuance of the action in order to enable the petitioner to obtain a certification from the Court of Appeals of New York that the federal question was raised before that Court. *Lynch v. New York ex rel. Pierson*, 293 U. S. 54-55; *Kedroff v. St. Nicholas Cathedral*, 334 U. S. 94-97.

REASONS FOR GRANTING THE WRIT

I

The Nevada decree was denied full faith and credit by the Courts of the State of New York.

1.

Under the law of the State of Nevada, the separation agreement here ceased to exist after the decree was rendered. Thereafter, all rights stemmed from the Nevada decree, and the agreement was merged in, and superseded by, the Nevada decree. The legal efficacy of the agreement was terminated. *Lewis v. Lewis*, 53 Nev. 398, 411-412, 2 P. 2d 131, 136; *Fleming v. Yoke*, 53 F. Supp. 552, 554-555 (N. D. W. Va.).

Inconsistent with both Nevada law, and its own findings of merger (R. 8; 19), the Trial Court declared that this action arose out of the (superseded) separation agreement, not the Nevada decree. This denied full faith and credit to the Nevada decree.

The Court found that the separation agreement (R. 8; 14), not the decree, was ambiguous and that the agreement required construction (R. 14; 17).

That which no longer exists cannot have an ambiguous legal effect; it has *no* legal effect. Under Nevada law, the formula provision in the agreement had no effect when this lawsuit commenced. Only the decree formula was binding on the parties.

The Court correctly stated, and it later found, that it had no power to change or modify the Nevada decree (R. 14; 74). By acting on the separation agreement, the New York

Courts excised it from the Nevada decree, wherein it had been merged and superseded, and, contrary to Nevada law, reincarnated the agreement. *Lewis v. Lewis*, 53 Nev. 398, 411-412, 2 P. 2d 131, 136; *Fleming v. Yoke*, 53 F. Supp. 552, 554-555 (N. D. W. Va.). This recreation of the separation agreement modified the decree.

Each state must give to the judgments of other states the same effect that those judgments would have in the state of rendition. 62 Stat. 947 (1948), 28 U. S. C. § 1738 (1950); *Roche v. McDonald*, 275 U. S. 449, 451-2; etc. By acting upon the superseded separation agreement, the New York Courts failed to meet this standard.

The Nevada Court evidenced its intent that the separation agreement be merged in the decree by incorporating the provisions thereof in the decree (R. 8; 19; 236-237). It is not necessary for the Court of rendition to expressly enumerate every effect that its decree is to have. The decrees of a state carry with them all the pertinent and applicable laws of that state. A second forum cannot whittle away the scope of a decree as rendered. *Roche v. McDonald*, 275 U. S. 449, 451-452; *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 438. That is what New York has done in this case.

2.

The Courts of New York have also denied full faith and credit to the Nevada decree through the New York modification of that decree.

Under Nevada law, no decree may be modified more than six months after adjudication except as provided by special statute. *Lauer v. Eighth Judicial District Court*, 62 Nev.

78, 83-84, 140 P. 2d 953, 955; *Crowell v. Second Judicial District Court*, 54 Nev. 400, 402, 19 P. 2d 635, 636.

The six months limitation in Nevada is imposed by Rule XLV of the *District Court Rules of the State of Nevada*. Under Nevada law, court rules not inconsistent with statutes have the force and effect of statutes. *Lauer v. Eighth Judicial District Court*, 62 Nev. 78, 83-84, 140 P. 2d 953, 955. Here there is no inconsistency with any statute. A 1947 Nevada statute specifically forbids any retroactive modification of support provisions. *Nevada Compiled Laws*, Supp. 1943-1949, Sec. 9474.01.

There is no statute which would permit the Nevada Court to restore the legal efficacy of a merged separation agreement prospectively, or retroactively as was done by the New York Courts.

Under Nevada law, the modification made by the New York Courts is impossible. This Court has previously had occasion to rule upon retroactive modification under Nevada law, and has found such modification impossible. *Helvering v. Fuller*, 310 U. S. 69, 73.

A similar question of retroactive modification of a Nevada decree was presented in *Roskein v. Roskein*, 25 N. J. Super. 415, 424, 96 A. 2d 437, 442. There, the New Jersey Court said:

> "Under Nevada law a divorce decree rendered by its courts is final and cannot be modified. Accordingly, the courts of New Jersey may not do what the Nevada court cannot."

Under Nevada law, the separation agreement had been merged and superseded in the decree. *Lewis v. Lewis*, 53 Nev. 398, 411-412, 2 P. 2d 131, 136; *Fleming v. Yoke*, 53 F. Supp. 552, 554-555 (N. D. W. Va.).

The only way in which the separation agreement could have been legally acted upon by the New York Courts was for the Nevada Court to modify its decree so as to *specifically* provide that, contrary to the generally applicable principles of Nevada law, the separation agreement in this particular case survived the Nevada decree. The Nevada Court did not do that. Nor, at the time when this action was commenced, could the Nevada Court have modified its decree even if it had desired to do so. Accordingly, the specific and unequivocal action of the New York Courts upon the separation agreement, worked a fatal modification of the Nevada decree (R. 8; 14; 17; 19). *Cf. Roche v. McDonald*, 275 U. S. 449, 451-452.

This Court has never definitively stated the scope of permissible modification under the doctrine of full faith and credit. It has been held elsewhere, that under no circumstances can the forum modify the decrees of another state. *Johnson v. Johnson*, 196 S. C. 474, 479, 13 S. E. 2d 593, 595. At most, one state court may modify the decrees of another state only to the extent that those decrees are subject to modification in the state where made. *Roskein v. Roskein*, 25 N. J. Super. 415, 424, 96 A. 2d 437, 442; *Cf. Halvey v. Halvey*, 330 U. S. 610, 614-615. More than this would be contrary to the rule that state decrees shall have everywhere the same effect they have where rendered. *Roche v. McDonald*, 275 U. S. 449, 451-452.

Nevada court rules, and judicial decisions applying those rules, are within the definition of "Acts, records, and judicial proceedings" which are entitled to full faith and credit. 62 Stat. 947 (1948); 28 U. S. C. sec. 1738 (1950). The decision of the Court of Appeals of New York in this case, denies full faith and credit to those rules and decisions.

3.

Under Nevada law, the interpretation of a judgment or decree is to be accomplished by looking to the judgment roll which was before the Court which rendered the judgment or decree. *Aseltine v. Second Judicial District Court*, 57 Nev. 269, 273, 62 P. 2d 701, 702. Likewise, in the case of *Kent v. Smith*, 62 Nev. 30, 32-33, 140 P. 2d 357, 358, it was held to be error for a Court in interpreting a judgment, to consider evidence of events and circumstances occurring prior to the entry of the judgment (e.g. the separation agreement in the instant case). The Court there said: "A Court may construe a prior judgment but in so doing it is limited to the decree and the judgment roll and cannot properly consider extrinsic evidence."

Here the New York Courts did not look to the Nevada judgment roll. Thus it cannot be said in any event that the New York Courts' interpretation of the superseded agreement is tantamount to interpretation of the decree. The Trial Court itself stated that it was not interpreting the decree (R. 8; 14; 17). Such a contention, then or now, would again involve offense to full faith and credit.

The only efficacious legal instrument between the parties to the New York proceedings is the Nevada decree. Interpretation of the bald Nevada decree was impossible. The pleadings, findings and all pertinent parts of the record, in short, the judgment roll, should have been, and were not, examined by the New York Courts. *Aseltine v. Second Judicial District Court*, 57 Nev. 269, 273, 62 P. 2d 701, 702; *Kent v. Smith*, 62 Nev. 30, 32-33, 140 P. 2d 357, 358; *Chirelstein v. Chirelstein*, 12 N. J. Super. 468, 479, 79 A. 2d 884, 889; *Hendrie v. Lowmaster*, 152 F. 2d 83, 85 (C. A. 6) *Cf. Union Pacific R. R. Co. v. Mason City etc. R. R. Co.*, 222 U. S. 237, 247; 9 Wigmore, *Evidence*, (3d Ed. 1940), page 157.

Even if they had looked to the Nevada decree, rather than to the superseded separation agreement, the New York Courts could not have construed the Nevada decree based upon the isolated paragraph thereof which set forth the support formula. Rather, an examination of the issues decided and the evidentiary basis upon which the Nevada Court decided them, was necessary. *Oklahoma vs. Texas*, 272 U. S. 21, 42-43. Here, New York could not construe the decree without looking into the facts surrounding that decree. To do so would have been contrary to Nevada law and a denial of full faith and credit.

It is respectfully submitted that this Court should clearly establish, for future litigation, that the forum must give a sister state decree the same effect it would have under *all* the applicable case law, as well as statutory law of the original state.

4.

The respondent may contend that not only was the interpretation of the agreement tantamount to interpretation of the Nevada decree, but also, that interpretation of a decree cannot deny full faith and credit to that decree.

The petitioner denies, as in (3) *supra*, that the interpretation of the agreement here was an interpretation of the decree. However, even if it had been such, the interpretation made by the New York Courts was so unreasonable that it would have worked an illegal modification of the Nevada decree.

Thus, this case presents another important question for this Court: Where does the line lie between permissible "interpretation" and forbidden "modification"? (It will be remembered here that no modification of this Nevada

decree is possible under Nevada law. *Lewis vs. Lewis*, 53 Nev. 398, 411-412, 2 P. 2d 131, 136; *Fleming vs. Yoke*, 53 F. Supp. 552, 554-555 (N. D. W. Va.).)

"*Mere construction*" of a decree does not necessarily deny the decree full faith and credit, *St. Louis, etc. R. R. Co. v. Wabash R. R. Co.*, 217 U. S. 247, 250-251. But the Court in that case noticeably limited the power of the forum to "mere construction". In at least one other case, this Court has repeated the implication that full faith and credit may be denied to a decree by the construction placed upon that decree. *Commercial Publishing Co. v. Beckwith*, 188 U. S. 567, 576-577.

In the *Beckwith* case, this Court said that it would examine and reconsider the construction placed upon a foreign decree by the second forum in order to determine if that construction was a reasonable one. On the specific facts of the *Beckwith* case, this Court found that the construction contended for by those alleging denial of full faith and credit to be a strained interpretation. The obvious effect of that case is that where a forum has made an unreasonable interpretation of a sister-state decree, the interpretation will constitute a denial of full faith and credit.

Here, an interpretation was made by the New York Courts which is strained and unreasonable (see petitioner's second reason for granting the writ, *infra*). The "mere interpretation" (R. 14) worked a modification under the guise of interpretation. *See: Grinde Corp. v. Klindworth*, 77 N. D. 597-613-614, 44 N. W. 2d 417, 427-428.

It is respectfully submitted that this Court should apply and expand upon the implications in the *Beckwith* and *St. Louis R. R. Co.* cases, *supra*, and that the Court should now specify the extent to which sister state judgments may be "interpreted" before they are modified.

5.

In the case of *Rogers v. Alabama*, 192 U. S. 226, 230-231, this Court, speaking through Mr. Justice Holmes stated: "It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights".

Here, the petitioner's constitutional right to have the Nevada decree given full faith and credit in New York, has been denied. This Court is the sole arbiter of exceptions to the doctrine of full faith and credit. *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 438. If there is an exception to that doctrine which permits the Courts of New York to disregard the effect of a Nevada decree which, under Nevada law, superseded a prior separation agreement, and to modify that decree at a time, and in a manner, which was forbidden under Nevada law, then this Court is the only Court with the power to specify and define that exception.

It is respectfully submitted that this Court should grant certiorari and answer the question of the existence of such an exception to the principles of full faith and credit.

II

The Decision below was wrong

This Court should grant a writ of certiorari to review the decision below, not only because that decision denied full faith and credit to the Nevada decree, but also because that decision, substantively, was wrong. It was wrong because it was an erroneous interpretation of the meaning of the formula provision.

In making the additional request that this Court review the interpretation made by the New York Courts, the petitioner is asking only that which it is settled this Court will undertake to do. *Commercial Publishing Co. v. Beckwith*, 188 U. S. 567, 576-577. This case is also within the group where a conclusion of law as to a federal right, and lower court findings of fact, are so intermingled as to make it necessary for the Court to analyze the facts in order to pass upon the federal question. *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389, 394; *Wood v. Chesborough*, 228 U. S. 672, 677-678. *Cf. Rogers v. Alabama*, 192 U. S. 226, 230-231.

The formula in the Nevada decree specified that the respondent and the parties' minor children should receive annually one-third of the petitioner's "net income for federal income tax purposes * * * from personal services * * *" (R. 236-237). The quoted phrase owes its existence and effect to the federal income tax laws. This was further shown by the requirement that petitioner furnish to the respondent copies of his federal income tax returns and any changes therein as evidence of the computation (R. 236; 21). By denying to the petitioner the personal deductions provided in the Internal Revenue Code (R. 20-21; 270; 2a), the New York Courts have changed the formula so that now the petitioner is obligated to pay one-third of his *adjusted gross income* from personal services, not one-third of his "*net income* for federal income tax purposes * * * from personal services * * *" (R. 20-21; 269-272).

The Nevada Court incorporated by reference in its decretal formula, the measuring standard of the Internal Revenue Code for the computation of "said net income" (R. 236). Under the separation agreement, upon which

the Courts below purported to act, the parties had also incorporated the Internal Revenue Code. Lawyers drew the instruments (R. 145-146), and used technical terms for specific meanings.

In those cases, only, it was decreed that the normal provisions of the Internal Revenue Code should not apply in the defining of petitioner's "formula income". The legal maxim of *expressio unius, est exclusio alterius* applies here. The lower courts' additional limitations on the applicability of the provisions of the Internal Revenue Code were in error.

This is dramatized by the fact that the additional limitation sought to be imposed was the exceptional requirement that petitioner's personal deductions not only be allowed by the Code, but also be directly attributable to the production of his "net income for federal income tax purposes * * * from personal services * * *". Neither in the decree, nor the agreement, does the phrase "directly attributable" appear, expressly or by implication. Had the Nevada Court (or the parties) intended such an additional limitation, they would have provided it specifically. *Expressio unius, est exclusio alterius.* This was substantiated during the trial when the Court sustained petitioner's objection to the respondent's introduction of that issue (R. 187-188).

It was petitioner's position before the New York Courts that any construction placing an additional, non-Code, non-decree qualification on the allowability of personal deductions was a denial of full faith and credit (R. 107-108; 184-185).

The Internal Revenue Code is concerned with *all* sources of net income. The Nevada formula is concerned with net

income from personal services for federal income tax purposes (R. 236). The New York Courts have apparently concluded that there is no express concept in the Internal Revenue Code of "net income for federal income tax purposes * * * *from personal services*", and that as a result, the Code does not govern the computation of petitioner's "formula income".

This ignores the theorem that the greater always includes the lesser, and the fact that millions of taxpayers whose only source of taxable income is from personal services are required to compute their net income therefrom under the Code. The decree formula depends, for both effect and existence, upon the Internal Revenue Code. In that light, the formula is neither uncertain nor ambiguous.

Having found ambiguity, the construction of the formula provision drawn by the Courts below violated the rule that "Where a judgment is susceptible of two interpretations, it is the duty of the Court to adopt the one which renders it more reasonable, effective and conclusive in the light of the facts and the law of the case." *Penkan Gas & Oil Co. v. Warfield Natural Gas Co.*, 137 F. 2d 871, 885 (C. A. 6); 30 Am. Jr., *Judgments*, Sec. 31. Here, the New York Courts chose a meaning which was unreasonable, and a strained construction of the formula provision. This was modification and change rather than interpretation (See Reason I(4), *supra*). It was also a proscribed re-inquiry into the merits of the action adjudicated in the Nevada courts. *Milliken v. Meyer*, 311 U. S. 457, 462.

It was neither the function, nor within the power of the New York Courts to vary from the provisions of the Nevada decree and the definitions of the Internal Revenue Code simply because, on the reexamination of the merits,

they considered the respondent's case more equitable. *Cf. Russell v. Russell*, 142 F. 2d 753, 754 (C. A. D. C.).

The Nevada Court incorporated the provisions of the Internal Revenue Code into the decree, and the parties and the New York Courts alike, are bound thereby.

Conclusion

For the reasons stated above, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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1435 Rand Building,
Buffalo 3, New York.

Appendix A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and Statutory provisions are involved in this case:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

United States Constitution, Article IV, Sec. 1.

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

62 *Stat.* 947 (1948); 28 *United States Code* § 1738 (1950).

Appendix B

DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.

1 N. Y. 2d 785.

MADELEINE L. STONE, *Respondent*,

v.

LESTER E. STONE, *Appellant*.

Court of Appeals of New York.

May 24, 1956.

Appeal from Supreme Court, Appellate Division, Fourth Department, 1 A. D. 2d 756, 147 N. Y. S. 2d 209.

Divorced wife brought action against divorced husband for specific performance of certain provisions of a separation agreement.

The Supreme Court, Erie County, Robert E. Noonan, J., entering judgment for divorced wife, and divorced husband appealed.

The Appellate Division modified and affirmed the judgment and held that separation agreement, as properly construed, contemplated that, for purpose of computing net income for alimony purposes, divorced husband was entitled to make deductions for his share of charitable contributions of a business firm, not exceeding prescribed ratio.

The divorced husband appealed to the Court of Appeals, contending that he correctly computed his net income for federal income tax purposes for 1953 as adjusted to be $21,049.06, pursuant to the definition of the formula provision, and that respective determinations by the Trial

Court and the Appellate Division, of husband's net income for federal income tax purposes from personal services were in conflict with the evidence and contrary to law, and that judgment of those courts relating to the furnishing of returns by divorced husband for years not involved in the action and in manner not provided for by the decree and the agreement or alleged in the pleadings, had no legal force, and that separation agreement was merged into the Nevada divorce decree, and that rights of infant children to support and maintenance by divorced husband were fully protected under the Nevada divorce decree, as were the rights of the divorced wife to the alimony payments prescribed thereby.

Kavinoky, Cook, Hepp & Sandler, Buffalo (Edward H. Kavinoky, Buffalo, of counsel), for defendant-appellant.

Miller & Ulsh, Buffalo (David L. Landy, Wallace H. Miller, Buffalo, and Francis X. Murphy, Buffalo, of counsel), for plaintiff-respondent.

Judgment affirmed, with costs.

All concur.

[1 N. Y. 2d 785, 135 N. E. 2d 590.]

Office - Supreme Court, U.S.
FILED
OCT 1 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 375

LESTER E. STONE,
117 West Grimsby Road,
Kenmore, New York,

Petitioner,

vs.

MADELEINE L. STONE,
314 North Detroit Avenue,
Los Angeles 36, California,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

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Los Angeles 36, California,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondent respectfully submits that this Court should not grant a writ of certiorari in this case.

Citations to Opinions Below

The decision of the Court of Appeals printed as Appendix B of the petition (pp. 23-4) and captioned "1 N. Y. 2d 785" is not the official report at 1 N. Y. 2d 785, which is printed herein as Appendix A, but the substantially different unofficial report at 153 N. Y. S. 2d 53.

Jurisdiction

28 U. S. C. Sec. 1257 (3) provides that "Final judgments * * * rendered by the highest court of a State * * * may be reviewed by the Supreme Court * * * by writ of certiorari * * * where any * * * right * * * is specially set up or claimed under the Constitution, * * * or statutes of * * * the United States".

Questions Presented

The questions presented involve the formula provision of a New York separation agreement and the identical provision of a subsequent Nevada divorce decree determining the amount of alimony for the wife and maintenance and support payments for the children. For brevity, both provisions are hereinafter referred to as the "formula" or "formula provision".

The questions presented are:

1. Whether the petitioner can present to this Court the claim of denial of full faith and credit to a Nevada divorce decree where petitioner-defendant in an action upon the separation agreement and decree in the New York courts did not assert this claim in his pleadings, upon trial, in briefs and not until, for the first time, in his petition for reargument to the Court of Appeals of New York?

2. Whether the petitioner may now assert the claim of denial of full faith and credit to a Nevada divorce decree, raised for the first time in his petition for reargument to the New York Court of Appeals, by claiming wrong interpretation of the formula provisions, where petitioner at outset of trial specifically agreed that the Nevada divorce decree did not supersede the New York separation agreement and that the New York court could in-

terpret the separation agreement and the decree and his only claim was that the interpretation urged by respondent, and adopted by the New York courts, would constitute modification?

3. Whether the interpretation by the New York courts of the formula provision was based upon grounds not presenting any question of denial of full faith and credit to the decree?

4. Whether it is a denial of full faith and credit for the New York courts to render a judgment based upon their interpretation and application of the formula provision?

5. Whether it is a denial of full faith and credit for the New York courts to give the formula provision a reasonable interpretation, and based thereon to render a judgment?

6. Whether the interpretation by the New York courts of the formula provision is so unreasonable as to constitute indirect modification of, and denial of full faith and credit to, the decree?

Statement

Respondent wife sued to enforce the formula provision of the separation agreement and decree (Pet. 4); pleading both the agreement and the decree (R. 31-2).

At the outset of trial, the parties agreed with the Trial Court that the issue was interpretation of the formula provision—identical in the separation agreement and the decree; and that the Nevada decree did not supersede the separation agreement (R. 59, 72-3).

The Trial Court received both the separation agreement (Pl. Ex. 1, R. 61, 199) and decree (Def. Ex. A, R. 148, 233) in evidence; and specifically found that the de-

cree includes the identical formula provision of the agreement (R. 19), that the formula was ambiguous and required interpretation (R. 17), and that in the light of the surrounding circumstances and the practical construction by the petitioner, the proper interpretation of the formula was that "the amount of the maintenance and support payments * * * shall be determined by the defendant's income from personal services * * * less such expenses as are directly attributable to the production of such income and are allowed by the federal income tax law as deductions * * *" (R. 20).

The Trial Court's findings and conclusions were based upon the formula provision of both the separation agreement and the decree (R. 19).

Petitioner did not raise any federal question of full faith and credit to the Nevada decree upon the trial or in briefs submitted to the Trial Court; nor did petitioner raise any federal question before the Appellate Division or the Court of Appeals—until his petition for reargument to the last court (R. 365 *et seq.*).

Respondent agrees that the New York courts had before them the question of enforcing the divorce decree (Pet. 4), including the identical formula provision of the separation agreement. By its judgment the New York court interpreted and enforced the decree—the conclusion of the New York courts is founded as much on the decree formula as the identical separation agreement provision (R. 19).

Facts

The parties were married on May 29, 1936 and had three children, 14, 8 and 8 years old respectively, at the time of trial.

On January 31, 1953, the parties entered into an Agreement of Separation dated January 2, 1953 (R. 66) in New York; followed by a Nevada divorce decree on March 20, 1953, (R. 148); and petitioner married his new wife on March 26, 1953 (R. 79). The decree did not, by its terms, incorporate the separation agreement (R. 234-5); although certain provisions are identical (R. 235-9).

Petitioner, a college graduate (R. 62), has been a certified public accountant (R. 62) and a partner in the accounting firm of Harry Lewis Stone & Co. since 1936 (R. 62). Petitioner, a tax expert, has actively practiced before the United States Treasury Department (R. 63-4). Petitioner for several years prior to 1953 was also a partner of Harry Lewis Stone & Bros. (R. 132; 350).

During the negotiation, drafting and preparation of the separation agreement, petitioner followed the negotiations carefully (R. 75; 117-8); reviewed proposed provisions with his counsel; and made suggestions for different and other clauses (R. 117). He understood fully all the provisions of the separation agreement (R. 117-8).

During negotiation of the separation agreement, petitioner submitted to respondent the federal and state income tax returns of his two partnerships, Harry Lewis Stone & Co., the accounting partnership, and Harry Lewis Stone & Bros., the investment partnership (R. 142). Petitioner did not submit his personal federal income tax returns (R. 142).

The separation agreement provided that petitioner should pay to respondent for the support and maintenance of herself and the children "For and during * * * 1953 * * * $875 * * * per month" (R. 201).

The partnership returns of Harry Lewis Stone & Co. for fiscal years ending in 1951 and 1952—which had been

submitted to respondent—showed that petitioner's distributive share of "ordinary net income" (R. 131) was $30,808.40 (R. 303, col. 3) and $29,043.60 (R. 308, col. 3) respectively. The 1953 payments of $875 per month, or $10,500 per year, were 34% and 36% respectively of petitioner's "net income from personal services" from his chief source of income from personal services, namely Harry Lewis Stone & Co. (R. 131-2; 142) for 1951 and 1952—the two years preceding the making of the separation agreement.

The 1953 specific dollar provision for maintenance and support was carried over to 1954 and thereafter by the formula provision (R. 202).

On January 1, 1954, the formula provision became operative (R. 165; 202) and required application (R. 202).

On January 14, 1954, petitioner wrote respondent the following letter:

> "Enclosed herewith are my two checks in the amount of $224.41 each, payable to your order, on account of your alimony, and provision for the children.
>
> These checks take into account the adjustment in the amounts which I will be sending you this year, based on ⅓ of my earnings for the fiscal year ended June 30, 1953.
>
> The amount of my earnings in that period was $30,596.42, out of which I am required to make payments of ⅓ divided equally between you and the children.
>
> One-third of $30,596.42 is $10,198.82. On a monthly basis that would divide into twelve payments of $849.90. However, in order to round off the monthly checks I have adjusted the month of January to provide for a total payment of $848.82, of which you received $400.00 on January 1 and the balance of $448.82 herewith.

> Monthly checks to follow will total $850.00, $400.00 of which will be paid on the 1st of each month and $450.00 on the 15th" (Pl. Ex. 9; R. 105; 217).

When petitioner wrote the letter, he had a copy of the separation agreement and divorce decree (R. 138) and had their provisions in mind (R. 139), particularly the provisions relating to the formula, which was not ambiguous to petitioner (R. 139).

During January through July, 1954, petitioner forwarded respondent each month, in performance of his obligation, $400 and $450 (R. 141).

The U. S. partnership return of income of Harry Lewis Stone & Co.—petitioner's only source of personal earnings during 1953 (R. 131-2; 142)—shows that his "ordinary net income" for 1953 was $30,596.42 (R. 134; 332; 333), the same amount referred to in his letter of January 14, 1954 (R. 251).

Petitioner did not send respondent similar maintenance and support payments due from August 1, 1954 on.

Petitioner claimed on trial that when he wrote the letter of January 14, 1954 (R. 217), he intended the letter should be an "offer" in lieu of all provisions of the formula—even though the letter "did not constitute compliance with that provision" (R. 191), and petitioner did not advise respondent to that effect (R. 191).

Petitioner admits no figure on the federal income tax return for 1953 states his net income for federal income tax purposes earned and received from personal services during 1953 (R. 175).

The interpretation of the New York courts rejected petitioner's claims:

(a) That in computing the amount of alimony and support due to respondent and their three children during 1954, he is entitled to deduct the amount of alimony ($5,250) paid to respondent in 1953 (R. 176).

(b) That if in 1953 he received $20,000 income from investments and $5,000 income from personal services and his federal income tax personal deductions aggregated $5,000, that in 1954 he would not be obligated to pay respondent anything for alimony or for the support of their three children (R. 183-4).

(c) That all deductions on his joint federal income tax return for 1953 (R. 241-56) are an expense of producing his income from personal services (R. 187), including taxes on his home (R. 187), and $12.00 for dancing lessons (R. 188).

(d) That if he made an investment, the income from such investment would be excluded in computing alimony and support, but if the investment resulted in a loss, that loss would be included to reduce that alimony and support for the next year (R. 188-9).

REASONS FOR NOT GRANTING THE WRIT.

I.

Petitioner did not raise the constitutional question of full faith and credit in the New York courts pursuant to state practice and therefore cannot present such question to this Court.

To obtain review by this Court of the decision of the Court of Appeals, it must affirmatively appear that the Court of Appeals decided a federal question.

Where under state practice the highest state court refuses to pass upon a constitutional question which was not raised in the Trial Court, this Court has repeatedly refused to review such decision. *Bailey v. Anderson*, 326 U. S. 203 (1945); *Hartford Life Ins. Co. v. Johnson*, 249 U. S. 490 (1919).

In New York, constitutional issues, federal or state, not raised before the Trial Court will not be considered by the appellate courts; and such issues not raised before the Appellate Division will not be considered by the Court of Appeals.

> "The development of the rule regarding new questions on appeal has taken a unique turn in those cases where the new question is one involving the constitution. Here it is settled that unless the constitutional argument is properly raised below, it will not be considered on appeal even though there could be no answer to it in any court." *Cohen and Karger, Powers of the New York Court of Appeals* (Rev. Ed. 1952), 641.
>
> *Vose v. Cockroft*, 44 N. Y. 415 (1871).
>
> *Nod-Away Co. v. Carroll*, 240 N. Y. 252 (1925).

This Court examined the practice of the New York Court of Appeals of refusing to pass upon constitutional issues not raised at trial, and concluded the refusal of the Court of Appeals to pass upon a federal question not raised below was a matter of state practice and dismissed the cause for want of jurisdiction. *Purdy v. Erie R. R. Co.*, 185 U. S. 148 (1902).

This rule applies to a claimed denial of full faith and credit. *Hartford Life Ins. Co. v. Johnson*, 249 U. S. 490 (1919); *Chicago, Ind. & Louisville Ry. Co. v. McGuire*, 196 U. S. 128, 131-2 (1905).

Despite petitioner's unsupported assertions (Pet. 8), the Record is plain that petitioner did not raise any issue

as to full faith and credit until his petition for reargument before the Court of Appeals (R. 365 *et seq.*).

However, a federal question raised in such a petition for reargument cannot provide a basis for Supreme Court review, unless the highest state court expressly passes upon the federal question—which the Court of Appeals did not do here. *Herndon v. Georgia*, 295 U. S. 441 (1935).

To obtain review by this Court of the decision of the New York Court of Appeals, it must *affirmatively* appear that the question of full faith and credit was *necessarily* decided by the Court of Appeals in reaching its result. *Phyle v. Duffy*, 334 U. S. 431 (1948); *Wood v. Nierstheimer*, 328 U. S. 211 (1946).

This requirement must be met, even though a federal question were properly raised, which it was not here. *Phyle v. Duffy*, *supra*; *Fox Film Corp. v. Muller*, 296 U. S. 207 (1935).

The record does not meet that requirement of this Court. Full faith and credit was not mentioned in the opinion or decision of the Trial Court or in the memorandum of the Appellate Division—and the Court of Appeals affirmed without opinion.

The New York courts interpreted and construed the ambiguous formula provision. The interpretation is an adequate non-federal basis for decision and will not be reviewed by this Court. *Fox Film Corp. v. Muller*, *supra*; *Kryger v. Wilson*, 242 U. S. 171 (1916).

Petitioner concedes that construction of a decree does not necessarily deny the decree full faith and credit (Pet. 16). That is all the New York courts did (R. 17, 19).

It is respectfully submitted the decision of the New York courts did not involve any constitutional issue of full faith

and credit, and therefore, petitioner cannot present such question to this Court.

Recognizing this, petitioner makes his "threshold" argument (Pet. 6); but his cases do not support his argument. In every case cited, the federal question was presented for decision to the Trial Court:

In *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574 (1885), upon trial appellant moved to dismiss upon ground state statute was unconstitutional. In *Mo., Kans. & Tex. Ry. Co. v. Haber*, 169 U. S. 613, at 621-2 (1898), appellant, in its answer, requests for instructions, and as shown by opinion of Supreme Court of State, contended throughout litigation that federal law nullified conflicting state statute. In *Manhattan Life Ins. Co. of N. Y. v. Cohen*, 234 U. S. 123 (1914), cited as authority for the exercise of jurisdiction, this Court actually dismissed for want of jurisdiction. In *Bryant v. Zimmermann*, 278 U. S. 63 (1928), involving the constitutionality of a state statute, this Court entertained jurisdiction based upon the petition to the Trial Court alleging unconstitutionality and upon the opinions of the Appellate Division and Court of Appeals affirmatively showing the question of constitutionality was raised and decided by those courts. In *Charleston Fed. Sav. & Loan Assn. v. Anderson*, 324 U. S. 182 (1945), petitioner raised the federal question in its pleadings.

II.

The New York courts gave full faith and credit to the Nevada decree.

Petitioner's entire argument rests upon the false syllogism that (a) the Nevada decree merged and superseded the separation agreement, (b) the New York courts modified the decree by its interpretation, (c) therefore the

New York courts failed to give the Nevada decree full faith and credit.

His major premise ignores (a) the admitted fact that the action sought enforcement of the decree (Pet. 4, R. 35) and the separation agreement (R. 35), (b) that petitioner's answer admits the separation agreement and the identity of the formula provision in the separation agreement and the decree (R. 32-3, 36, 38), and sets up no claim of merger (R. 36-9), (c) that the Nevada law was neither pleaded (R. 36-9) nor proved to the Trial or Appellate Courts, (d) that the language to be interpreted was admittedly identical in the agreement and decree (R. 32-3, 36), (e) that petitioner upon trial agreed that the decree did not supersede the agreement (R. 59-60; 73), (f) that under Nevada Law it is not clear that such a decree would merge the agreement.

His minor premise ignores the fact that (a) the decretal and contractual provision is ambiguous (R. 17), (b) that defendant's counsel conceded at trial that the New York court could interpret the decree (R. 59-60; 73-4), (c) that defendant in his letter of January 14, 1954 and for seven months thereafter placed the same construction upon the decree as the New York courts (R. 105, 217).

The New York courts enforced the decree, as they were required to do by the full faith and credit clause of the Constitution. It is settled that the exercise by the New York courts of an independent judgment in placing a construction upon the Nevada decree cannot present a federal question under the full faith and credit clause of the Constitution. *Hartford Life Ins. Co. v. Johnson*, 249 U. S. 490, 494 (1919); *Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36, 50-2 (1910); *Smithsonian Institution v. St. John*, 214 U. S. 19, 29 (1909)--as petitioner concedes (Pet. 16).

Petitioner does not even *prima facie* show that the interpretation of the New York courts was "strained and unreasonable" (Pet. 16). It is petitioner's interpretation asserted seven months after his own prior construction which he now denounces which is strained and unreasonable.

This is hardly a case for this Court to lay down any broad rules as to what constitutes interpretation and what constitutes reformation or modification.

III.

The decision of the New York courts was correct.

Petitioner's basic claim is that he can deduct alimony paid in 1953 to reduce his alimony and support payments for 1954 (R. 176). He claims he may deduct all other personal expenses which happen to be also tax deductions (R. 172-3).

The New York courts properly found that the formula was ambiguous and required interpretation and construction (R. 17). The construction given by the New York courts to the basic decretal provision "net income for federal income tax purposes * * * earned and received from personal services * * * including * * * partnership distributions * * * but excluding income * * * from investments and trading in securities" was correct as a matter of pure interpretation even unaided by any surrounding circumstances and *a fortiori* when aided by the practical construction of petitioner himself and other surrounding circumstances.

The formula provides for inclusions and exclusions. Net income from partnership distributions, $30,596.42, is an inclusion; net income from investments in an exclusion.

Nothing in the formula permits the whittling down of the inclusions except the single adjustment for charitable contributions made through his business, which adjustment has been allowed (R. 271-2; 275).

What the parties both intended when the agreement was made and the decree entered is perfectly clear in the light of the surrounding circumstances, as petitioner well knew when he wrote his letter of January 14, 1954 (R. 105, 217) and of February 3, 1954 (R. 106, 218). Petitioner had two sources of income, first from personal services as an accountant from Harry Lewis Stone & Co. (R. 62) and second, from Harry Lewis Stone & Bros. from investments and trading in securities (R. 132; 339). His distributive share of Harry Lewis Stone & Co. was to constitute his net income from personal services and his distributive share from investments of Harry Lewis Stone & Bros. was to be excluded. The language is custom-tailored to fit petitioner's participation in his two partnerships.

The parties and the Nevada Court deliberately rejected the statutory definition of "net income" and provided a special, private, contractual definition—substantially different. The formula excluded items of income which the Internal Revenue Code included. The Code defines gross income and net income. But the Code does not and cannot define net income from personal services. All deductions are taken from *all* income to determine net income. There is no way to fractionate deductions so as to apply some against gross income from personal services and some against gross income from other sources. Petitioner "solves" this dilemma typically by charging every deduction, even his *capital losses*, against income from personal services (R. 189). The Courts below correctly rejected so unjust and illogical an interpretation.

The amount of support payments for the parties' infant children as well as alimony for the respondent depends

upon the formula (R. 17). If respondent should remarry or die, the children's interest would be the entire interest at stake (R. 204). The law extends every possible protection for infants. When parents contract for the support of their children, the law will interpret their contract to give effect to its principal purpose rather than to defeat it. The children should not be hurt now by petitioner's afterthought (R. 13).

Alexander v. Alexander, 158 F. (2d) 429, *cert. den.* 330 U. S. 845 (1947), presented a question of interpretation very close to this case and is square authority for the decision of the New York Courts. In addition, here, the decision is confirmed by petitioner's practical construction of the formula.

Petitioner's voluntary declarations and practical construction of the formula are conclusive. *Matter of Herzog*, 301 N. Y. 127, 137 (1950); *Brooklyn Public Library v. City of New York*, 250 N. Y. 495, 501 (1929); *Carthage T. P. Mills v. Carthage*, 200 N. Y. 1, 14 (1910); 17 *C. J. S.* 755-6, 763.

Conclusion.

For the reasons above stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

1 N. Y. 2d. 785

MADELEINE L. STONE, Respondent, v. LESTER E. STONE, Appellant.

Argued April 16, 1956; decided May 24, 1956.

Husband and wife—support—separation agreement required defendant husband, partner in accounting firm, to pay plaintiff wife one third of husband's "net income for federal income tax purposes * * * earned and received from personal service"—defendant husband, for year 1954, sought to deduct from income, interest, charitable contributions and alimony paid plaintiff—wife demanded net income from which was deducted only those expenses directly attributable to production of such income—Special Term upheld wife's construction of agreement and Appellate Division modified by allowing husband to deduct his share of charitable contributions made through business partnership—judgment affirmed.

Stone v. Stone, 1 A D 2d 756, affirmed.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 12, 1956, which modified, on the law, and affirmed, as modified, a judgment of the Supreme Court in favor of plaintiff, entered in Erie County upon a decision of the court on a trial at Equity Term (ROBERT E. NOONAN, J.). The modification consisted of allowing defendant to deduct from his net income his share of the charitable contributions made by his firm for the year 1953 amounting to $386.17. Stated findings of fact contained in the decision of the court at Equity Term were reversed and new findings made by the Appellate Division in lieu thereof. The action was brought to compel specific performance of a

separation agreement entered into between plaintiff wife and defendant husband on January 2, 1953. In one cause of action, plaintiff sought to compel defendant to deliver a certified copy of his Federal income tax return for 1953—which defendant has done—and, in a second, to compel defendant to make alimony payments of $850 a month. The separation agreement provided that defendant should pay for plaintiff's support and that of the children as follows: "For and during the year 1954 and thereafter, payments shall continue to be made upon the first and 15th days of each month, each payment to be one-twenty-fourth (1/24) of one-third (1/3) of the First Party's net income for federal income tax purposes, (certified copies of returns and changes therein to be furnished to Second Party), earned and received from personal services from any source whatsoever for and during the preceding calendar year * * * in computing said net income of the First Party, it shall be adjusted so as to allow for charitable deductions made through his business or businesses not more than the average ratio of such charitable deductions made through Harry Lewis Stone and Co. to its gross income during the calendar years 1950, 1951, and 1952 or the fiscal years of said Harry Lewis Stone and Co. ending during said calendar years." Defendant husband was a member of the accounting firm of Harry Lewis Stone and Co. He also had income from investments and trading in securities through the investment firm of Harry Lewis Stone & Bros. For the fiscal years 1951 and 1952, he had an income of about $30,000 annually. During 1953 he paid plaintiff $875 a month or $10,500 for that year, which approximately equalled one third of his income. On January 14, 1954, defendant wrote plaintiff that "I will be sending you this year * * * 1/3 of my earnings for the fiscal year ending June 30, 1953. The amount of my earnings in that period was

$30,596.42, out of which I am required to make payments of ⅓ divided equally between you and the children. One third of $30,596.42 is $10,198.82. * * * Monthly checks to follow will total $850.00, $400.00 of which will be paid on the 1st of each month and $450.00 on the 15th." From January to July, 1954 defendant made payments in accordance with such letter. On July 28, 1954 defendant wrote plaintiff that $30,596.42 represented his gross income for Federal income tax purposes and that, after eliminating certain items, his net income for Federal income tax purposes was $21,049.06, one third of which was $7,016.35. When he began to pay plaintiff on that basis, this action was brought. In the Court of Appeals plaintiff argued that defendant's "net income for federal income tax purposes * * * from personal services" meant income from personal services less such expenses directly attributable to the production of such income as are allowed by the Federal income tax law as deductions. Defendant argued that the phrase "net income for federal income tax purposes * * * from personal services" meant earnings less the usual personal deductions allowed by the Internal Revenue Act, such as charitable contributions, taxes, interest and also alimony payments to plaintiff.

Edward H. Kavinoky for appellant.

David L. Landy, *Wallace H. Miller* and *Francis X. Murphy* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CONWAY, Ch. J., DESMOND, DYE, FULD, FROESSEL, VAN VOORHIS and BURKE, JJ.